No. 20236

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES RUBBER COMPANY,

Appellant,

v.

FRANCIS WRIGHT and MATT S. HUGHES, Trustee in Bankruptcy for Hank Wright's Sons, Inc., a corporation, and MATT S. HUGHES, Trustee in Bankruptcy for Francis Wright,

Appellees.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon

HON. WILLIAM G. EAST, Judge

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JURISDICTIONAL STATEMENT

This is a civil action brought originally by Francis Wright, a citizen of the State of Oregon, and Hank Wright's Sons, Inc., an Oregon corporation, against United States Rubber Company, a New Jersey corporation with its principal place of business in the State of

New York, to recover damages in the amount of $250,-000. The jurisdiction of the District Court was based upon the provisions of Title 28, U.S.C.A. § 1332, the amount in controversy being in excess of $10,000, exclusive of interest and costs, and the controversy being between citizens of different states (R. 1-4). Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, was added as an additional party plaintiff and Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., was substituted as party plaintiff for Hank Wright's Sons, Inc. (R. 10).

In the Pretrial Order (R. 9) lodged with the District Court on December 10, 1964, in "Plaintiffs' Contentions", three separate and distinct claims, not separately stated, against appellant are purported to be asserted: a claim by appellee Francis Wright for damages in amount of $100,000 for breach of a contract entered into between appellee Francis Wright and appellant, a second claim by appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, in the amount of $28,500 for damages for breach of the aforementioned contract entered into between appellee Francis Wright and appellant, and a third claim by Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., in the amount of $94,000 for damages for breach of a second and distinct contract entered into between Hank Wright's Sons, Inc. and appellant (R. 13-19). Two counterclaims were asserted by appellant and are conceded (R. 10-11). The change in the parties plaintiff did not in any manner affect the jurisdiction of the District Court as each claim

constituted a controversy between citizens of different states.

This is an appeal from an order of the District Court dated July 7, 1965, wherein said District Court certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. On motion of appellant, acquiesced in by appellees, on July 26, 1965, this court granted leave to file an immediate appeal pursuant to Title 28 U.S.C.A. § 1292(b), which appeal has now been perfected.

STATEMENT OF THE CASE

In the original complaint appellee Francis Wright and Hank Wright's Sons, Inc. demanded a joint judgment against appellant for $250,000 (R. 1-4). Appellant filed an Answer in the nature of a general denial and also asserted two counterclaims (R. 5-7). On December 10, 1964, a Pretrial Order (R. 9-29) was lodged with the court and subsequently signed by the District Court. Under Rule 34 (c) of the District Court the pretrial order supersedes the pleadings which are deemed to pass out of the case at that point. Appellees in said Pretrial Order (Plaintiffs' Contentions, R. 12-19, which we will hereafter refer to simply as "contentions") set forth three separate and distinct claims for damages for breach of contract which are not separately stated.

Contention 1 (R. 12-13) may be completely disre-

garded, as the allegations contained therein are entirely evidentiary. Contentions 2 through 6 (R. 13-14) state matters of inducement and have little, if any, pertinency to the questions involved in this appeal.

As to the claim of appellee Francis Wright, this appellee alleges that in early October 1961 appellant made an offer to appellee Francis Wright that it would enter into a contract with a corporation to be formed by said appellee by the terms of which contract it would "extend credit, marketing advantages, and loans sufficient to finance the proposed business, all as hereinafter set forth" (Contention 7, R. 14), in consideration of appellee Francis Wright performing certain acts (Contention 8, R. 14). Appellee Francis Wright alleges that he substantially performed all the acts required to be done by him to constitute an acceptance of the offer of appellant "or tendered the performance of them to defendant" (Contention 9, R. 14-15). Nowhere in the contentions does appellee Francis Wright allege that appellant breached the unilateral contract above outlined and in fact affirmatively alleges that appellant fully performed this contract in that on or about December 26, 1961, appellant and Hank Wright's Sons, Inc. entered into a bilateral contract wherein appellant promised to loan Hank Wright's Sons, Inc., the corporation formed by appellee Francis Wright, a specified sum of money, authorized a line of credit and agreed to provide other financial assistance (Contentions 13 and 14, R. 15-17).

Appellee Francis Wright then claims that appellant breached its contract with Hank Wright's Sons, Inc.,

causing that corporation to fail (Contentions 17 and 18, R. 18) and that as a result of the breach of contract between Hank Wright's Sons, Inc. and appellant, appellee Francis Wright was damaged in the amount of $100,000 in that his credit was damaged and impaired and his standing in the community was lowered (Contention 19, R. 18-19). It is further contended that this element of damage did not pass to said appellee's Trustee in Bankruptcy, Matt S. Hughes (Contention 22, R. 19).

Appellant in its contentions asserted that the allegations contained in "Plaintiffs' Contentions" failed to state a claim against appellant upon which relief can be granted appellee Francis Wright (Defendant's Contention 11, R. 22) and filed a motion wherein appellant clearly asserted that the claim of appellee Francis Wright failed to state a claim against appellant upon which relief could be granted appellee Francis Wright (R. 30-31). On the basis of the appellant's understanding or misunderstanding of the lower court's prior suggestion, the motion was, unfortunately, captioned as a motion for summary judgment under Rule 56, but the language of the body of the motion and all of the supporting papers made it clear that appellant was seeking to test the sufficiency of the alleged cause of action as a pleading or as a matter of law under Rule 12. Moreover the motion and supporting papers made the same objections severally as to the other causes of action alleged by the plaintiffs. Thereafter the District Court entered an order, dated April 2, 1965, denying the motion on the grounds that issues of fact existed. The court did

not rule on the questions actually raised by the appellant (R. 32-33) and did not treat the causes of action separately. Thereafter appellant filed a motion for reconsideration and in the alternative for allowance of an immediate appeal (R. 34-39), pointing out that the gist of the motion was under Rule 12, that the motion was made individually as to each of the causes of action alleged by the plaintiffs, and that the court had not ruled or had not ruled properly in its order of April 2, 1965. The District Court then made its order of July 7, 1965 (R. 40-41). That order stated that some of plaintiffs' contentions, without specifying which ones, stated a claim on which relief could be granted. An immediate appeal from that order was allowed by this court.

The precise question, therefore, before this court as to appellee Francis Wright is whether the allegations with reference to the individual claim of appellee Francis Wright state a claim upon which said appellee would be entitled to recover damages, which includes the question of whether a valid contract was actually entered into, whether a breach of contract has been alleged and, if so, whether the only damages demanded, namely damages for loss of credit and lowering of his standing in the community, are proper elements of damage, and if they are, who was entitled to recover these damages.

As to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, the alleged contract which is the basis for this claim is the identical unilateral contract upon which the claim of appellee Francis Wright is based and all facts heretofore set forth with reference to the claim of appellee Francis Wright are

applicable to this claim, except the difference in the claim for damages. As to damages, appellee Matt S. Hughes, trustee, claims that appellee Francis Wright was entitled to recover the sum of $25,000 expended by appellee Francis Wright in performing his part of the unilateral contract, together with the sum of $3,500, being the value of the time spent by appellee Francis Wright personally in doing the acts necessary to constitute an acceptance of appellant's offer, and that this claim vested in appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright by operation of law under the Bankruptcy Act.

The procedure followed by appellant in raising the contention that this claim failed to state a claim upon which relief can be granted was the same as in the case of the claim of appellee Francis Wright.

The precise question, therefore, before this court as to the claim of Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, is whether the allegations with reference to the individual claim of appellee Francis Wright which subsequently vested in appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, by operation of law, state a claim against appellant upon which relief can be granted appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright.

Now as to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., his derivative claim is based on a separate and distinct contract, a bilateral contract which was claimed to have been entered into on or about December 26, 1961 (Con-

tention 13, R. 15). The promises alleged to have been made by appellant are set forth in Contention 14 (R. 15-17) and the promises made by Hank Wright's Sons, Inc. to appellant are set forth in Contention 15 (R. 17-18). The purported performance of this contract by Hank Wright's Sons, Inc. and breach thereof by appellant are set forth in Contentions 16 and 17 (R. 18). The damages claimed to have been suffered by Hank Wright's Sons, Inc. for breach of this contract which vested in appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., pursuant to the Bankruptcy Act, amount to $94,000, being the expenses claimed to have been incurred by Hank Wright's Sons, Inc. in fulfillment of its contractual obligations (R. 19).

The procedural steps whereby appellant asserted that these allegations failed to state a claim upon which relief could be granted are the same as outlined in discussing the claim of appellee Francis Wright. In addition appellant raised the point in its Contentions (Defendant's Contentions 8, R. 21) that the alleged agreement was void for lack of mutuality, reiterated in its Statement of Points to be Relied Upon by Appellant on the Appeal, being Specification of Error 4(a) and 4(b) infra.

SPECIFICATIONS OF ERROR

1. The Contentions of appellees applicable to the claim of Francis Wright as an individual fail to state a claim upon which relief can be granted appellee Francis Wright and the District Court erred in not dismissing said claim for the following reasons:

(a) Appellee Francis Wright does not claim that appellant breached the contract which said appellee alleges was entered into between said appellee and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

(b) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant and that appellant breached this contract the damages claimed for breach of this contract by appellee Francis Wright, namely, damage to his credit and impairment of his standing in the community, are not proper elements to be considered in assessing damages for breach of a commercial contract of the type alleged.

(c) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant, that appellant breached this contract, and that damages for loss of credit and impairment of standing in the community are proper elements to be considered in assessing damages, title thereto would pass to the Trustee in Bankruptcy for Francis Wright.

(d) The claimed contract between appellee Francis Wright and the appellant was void because of indefiniteness and uncertainty.

2. The Contentions of appellees applicable to the claim of Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, fail to state a claim upon which relief can be granted appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright and the District Court erred in not dismissing said claim for the following reasons:

(a) Appellee Matt S. Hughes, Trustee in Bankruptcy, does not claim that appellant breached the contract claimed to have been entered into between appellee Francis Wright and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

(b) The claimed contract between appellee Francis Wright and appellant was void because of indefiniteness and uncertainty.

3. The Contentions of appellees applicable to the claim of Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., and the District Court erred in not dismissing said claim for the following reason:

(a) The purported contract claimed to have been entered into between Hank Wright's Sons, Inc. and appellant on or about December 26, 1961, was void because of indefiniteness and uncertainty.

4. Judgment on the pleadings as to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc. without prejudice to appellant's counterclaims should be granted for the reason that:

(a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant; or

(b) Said contract was expressly superseded by the bilateral contract between Hank Wright's Sons, Inc., and

appellant entered into December 27, 1961.

SUMMARY OF ARGUMENT

As to appellee Francis Wright, it is the contention of appellant that the allegations applicable to the claim of appellee Francis Wright fail to state a claim upon which relief can be granted for any one of four reasons enumerated under Specification of Error 1 and that the District Court erred in not dismissing this claim. We will present detailed argument in support of this position under four subheadings.

As to appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, it is the contention of appellant that the allegations applicable to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, fail to state a claim upon which relief can be granted for either of two reasons enumerated under Specification of Error 2, and that the District Court erred in failing to dismiss this claim. We will present detailed argument in support of this position under two subheadings.

As to appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., it is the contention of appellant that the allegations applicable to the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted for the reason that the alleged contract between Hank Wright's Sons, Inc. and appellant, the contract of December 26, 1961 as dis-

tinguished from the unilateral contract between appellee Francis Wright and appellant, was void because of indefiniteness and uncertainty and that the District Court erred in failing to dismiss the claim.

It is the further contention of appellant that considering all the pleadings in this case set forth in Plaintiffs' Contentions (Contentions 13, 14 and 15, R. 15-18) and Defendant's Contentions (Defendant's Contention 2, R. 20) and admissions of appellees (R. 23), the claim of Matt S. Hughes, Trustee, should be dismissed on the ground that there was either no consideration for the contract which appellees allege was entered into on or about December 26, 1961, or that this contract was expressly superseded by a subsequent contract entered into between Hank Wright's Sons, Inc. and appellant, the execution of which contract is admitted by appellees. This point will be discussed under Specification of Error 4(a) and 4(b).

The District Court apparently treated our motion for summary judgment wherein we contended that none of the three separate and distinct causes of action stated a claim upon which relief can be granted as directed jointly against all of the claims, so that if one of the claims stated a claim upon which relief could be granted our motion for summary judgment should be denied in toto (R. 40-41). We reiterate that our motion was directed individually against each claim so that a finding by this court that one of the claims does state a claim upon which relief can be granted does not call for a denial of our motion as to a claim which does fail to state a claim upon which relief can be granted.

ARGUMENT

I

1. The contentions of appellees applicable to the claim of Francis Wright as an individual fail to state a claim upon which relief can be granted appellee Francis Wright and the District Court erred in not dismissing said claim for the following reasons:

(a) Appellee Francis Wright does not claim that appellant breached the contract which said appellee alleges was entered into between said appellee and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

The claim of appellee Francis Wright for damages for loss of credit and lowering of his standing in the community in the amount of $100,000 is based on an alleged contract entered into between said appellee and appellant wherein it was agreed by appellant that it would enter into a contract with a corporation to be formed by appellee Francis Wright, the terms of which contract would provide that appellant would extend credit, marketing advantages and loans sufficient to finance the proposed business to be conducted by said corporation (Contention 7, R. 14). Appellee Francis Wright does not claim that appellant breached this contract and in fact affirmatively alleges that appellant did enter into such a proposed contract with Hank Wright's Sons, Inc., the corporation formed by appellee Francis Wright, wherein appellant agreed to loan the new corporation $40,000 for operating capital, to issue a line of credit of at least $200,000 and to grant other discounts

and financial benefits and operating advantages without any obligation of repayment, all of which are detailed in Contention 14 (R. 15-17). Appellee Francis Wright was not a party to this contract and the fact that appellee alleges that appellant breached this second contract is immaterial.

Obviously, where a party has performed all the promises he made to the other party there can be no breach of contract and consequential damages and the fact that the party demanding such damages has expended money in performing his part of the contract or as a volunteer is beside the point. The situation claimed by appellee Francis Wright herein is no different from a situation where appellant agreed that if appellee Francis Wright would do certain work for it appellant would execute a promissory note in a certain amount payable to the John Smith Corporation. Appellant executed the note exactly as agreed upon but when the note became due appellant failed to pay the note. Certainly no one would argue that appellee could recover damages because appellant failed to pay the note. Thus the claim of appellee Francis Wright should be dismissed for the simple reason that it fails to allege a breach of the contract and instead alleges that it was fully performed by appellant.

(b) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant and that appellant breached this contract the damages claimed for breach of this contract by appellee Francis Wright, namely, damage to his credit and impairment of his standing in the community, are not proper elements to be considered in assessing

damages for breach of a commercial contract of the type alleged.

Here we enter the realm of supposition and assume that this court does not agree with our prior contention and instead finds that appellee Francis Wright alleges a breach of the contract between appellant and said appellee. The only damage claimed by appellee Francis Wright is that his credit was damaged and impaired and his standing in the community was lowered, all to his damage in the sum of $100,000. The question then is whether damages of the nature demanded are proper elements to be considered in assessing damages for breach of a common commercial contract, namely, to enter into a contract providing for the financing of a business.

Oregon has long followed the rule of *Hadley* v. *Baxendale,* 9 Exch. 341 (1854) that damages to be recoverable must be such as it is reasonable to conclude were within the contemplation of both the parties at the time the contract was entered into in the event of a breach thereof. Now while the yardstick is what may reasonably have been within the contemplation of the parties at the time the contract was entered into, the law is well established that there are many situations where the court will hold as a matter of law that the damages claimed were not within the contemplation of the parties and we insist that the claim of appellee Francis Wright is of this nature.

The alleged contract was a simple and common commercial contract and there can be no argument that it would have been within the contemplation of the parties

that any tangible pecuniary loss that appellee Francis Wright suffered in performing the acts necessarily required to constitute an acceptance of the offer of appellant would be proper elements of damage but the claim here is for $100,000 for impairment of credit and for lowering of standing in the community. As stated, this was a commercial contract in which profit was the dominant motive. In such type of contract such nebulous, uncertain, remote and speculative damages as claimed here could not reasonably be within the contemplation of the parties as a matter of law.

Moreover, just what is meant by "lowering of standing in the community"? Is a man's standing in the community dependent on the amount of money he possesses or is it dependent on his character or is it descriptive of a mental state akin to humiliation, subjective in character? The same uncertainty applies to the claim for impairment of credit. Extension of credit is usually associated with integrity, although the amount of credit obtainable is often, though not necessarily, dependent on net worth. A person's net worth would not be decreased where there has been a breach of a contract because all pecuniary damages would be recouped in an award of damages for breach of contract.

So far we have discussed the claim of appellee Francis Wright on fundamental principles of contract law for the reason that to the best of our knowledge there are no cases where a plaintiff has ever claimed damages for lowering of his standing in the community based on breach of a commercial contract and because practically

all cases dealing with impairment of credit—and they are very few—treat this claimed damage as subjective in character and akin to mental anguish, anxiety or distress, and decline to allow consideration thereof except in exceptional cases. The exceptions to the general rule that only pecuniary damages actually suffered may be considered in assessing damages for breach of contract fall into several well-defined categories where it can reasonably be said that such damages, even though subjective and dependent on a state of mind, would have reasonably been anticipated. Common cases are: breach of promise to marry, failure of a bank to honor a valid check, and failure to render medical services.

Obviously it could reasonably be anticipated that when a man jilts a lady she might suffer humiliation and mental distress. Likewise, where a bank fails to honor a valid check it could reasonably be anticipated that an inference of dishonesty would arise or even that a man's credit would be damaged. All of these exceptions allowing recovery for humiliation, etc. are situations where by the very nature of the transaction mental distress might occur and while based on breach of contract sound in tort as distinguished from breach of a commercial contract where anticipated profit is the dominant feature.

For a general discussion as to those types of cases allowing recovery for mental suffering see: *Williston on Contracts,* Rev. Ed. Vol. V, § 1340. At pp. 3769-3770 Williston states:

"Mental suffering caused by breach of contract,

though it may be a real injury, is not generally allowed as a basis for compensation in contractual actions. Pecuniary loss is the usual measure. There are, however, exceptions conceded in many jurisdictions. *Where other than pecuniary benefits are contracted for* damages have been allowed for injury to the feelings . . . unjustifiable expulsion or mistreatment of passengers by carriers, or of guests by innkeepers are illustrations. Most courts, however, go further than this. The Restatement of Contracts states that damages will be given for mental suffering for 'wanton or reckless breach of a contract to render a performance of such character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than pecuniary loss.' Illustrations of this sort, where, however, the breach cannot always be 'wanton' are *refusal to comply with a contract for medical service* . . ." (emphasis added)

The Restatement of Contracts, commented upon by Williston, under § 341 at pp. 559-560 reads as follows:

"There are two classes of cases in which damages for mental suffering are allowed: Firstly, where it accompanies a bodily injury, in which case the action may nearly always be regarded as in the field of tort; secondly, where it was caused intentionally or in a manner that is wanton or reckless. In the second class are included wanton and reckless breaches of contract of such a character that the promisor had reason to know when the contract was made that its breach would cause mental suffering, for reasons other than mere pecuniary loss. The most common contracts of this kind are engagements to marry, contracts of carriers and inn-

keepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of death messages. Even in these cases, the rule stated in this Section denies recovery of damages for mental suffering, unless the breach was wanton or reckless; mere conscious neglect to perform such a contractual duty is not enough. A pecuniary injury caused by breach of contract is likely to be accompanied by mental suffering. In some cases of *sudden poverty or bankruptcy,* the suffering may be more severe than in cases involving marriage or death; but for mental suffering so caused, no compensatory damages are given." (emphasis added)

Turning now to the few cases dealing with claimed impairment of credit, we refer this court to *Swanson* v. *First National Bank of Barnum,* 185 Minn. 89, 239 N.W. 900. In that case the bank agreed to pay the balance due on two mortgages, failed to do so, and foreclosure proceedings were instituted. Plaintiff brought action to recover $5,000 general damages and $100 special damages for time and expenses incurred in clearing up the mortgage records. On the question of general damages plaintiff offered to prove that generally after the publication of the foreclosure notice he had difficulty in obtaining credit, that many people spoke to him about his farm being foreclosed, and that he suffered extreme worry. The trial court sustained objection to this offer of proof and on appeal the court stated:

"Plaintiff invokes the rule applied in cases where a bank has been held liable for damages for wrongful refusal to pay a check drawn upon the bank, and

for wrongfully protesting a check. . . . That rule does not apply to the facts in the present case. Where a check is given by one person to another, the presumption is that the payee or holder has given value for the check, and, when payment is refused, the inference arises that the maker has given a check upon a bank in which he has not sufficient funds for the payment thereof, or that he has obtained money or property by means of a worthless check. An inference of dishonesty or crime on the part of the maker of the check could readily be drawn. Here there was no check and no refusal of payment. The same inferences could not reasonably follow.

* * * * *

"We agree with the trial court that the action is one for breach of contract. Without alleging and proving the agreement by the bank to pay and obtain satisfaction of the mortgage, no recovery could be had. In actions for breach of contract, it is only in exceptional cases that *damages for injury to reputation,* or for mental suffering, can be recovered. The present case does not come within any of the exceptions." p. 901 (emphasis added)

Brunson v. *Ranks Army Store,* 161 Neb. 519, 73 N.W.2d 803, is a case wherein plaintiff alleged two causes of action, one based on breach of contract. Plaintiff alleged that he and the defendant entered into an oral contract wherein defendant hired the plaintiff to portray and to head and lead seven of defendant's employees in portraying the notorious payroll robbery of Brinks, a money-delivering firm of Boston, Massachusetts, as a publicity stunt in downtown Omaha. Defend-

ant agreed to notify the Omaha police of the publicity stunt so that plaintiff would not be arrested while staging the purported robbery. Unfortunately the defendant forgot to notify the police and as a result defendant and his seven companions were arrested and thrown in jail, the police not realizing it was a fake robbery. Plaintiff alleged that as a direct result of this breach of contract by defendant and his subsequent arrest and incarceration plaintiff was made the object of shame and ridicule, brought into disrepute by marring his good name and by destroying his long-enjoyed good standing and repute in the community, and that plaintiff suffered great and severe mental pain and anguish, shame, humiliation and disrepute; that the loss of plaintiff's good reputation and standing has made it impossible for him to obtain employment and by reason of the loss of good standing, good reputation and employment, plaintiff has suffered damages. In holding that the complaint failed to state a cause of action the court stated that the damages suffered by reason of the alleged breach of contract were largely in the form of mental suffering, anguish and embarrassment and that

> "Damages for mental anguish are not, as a general rule, recoverable in actions for breach of contract unless the breach amounts in substance to willful or independent tort. According to the weight of authority, mental anguish is not considered as an element of recovery in an action on an ordinary contract. See 15 Am. Jur., Damages, § 182, p. 599.
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> "The reason why such damages are not generally recoverable is that they are too remote and could not have been in the contemplation of the parties

when the contract was made. See Annotation, 23 A.L.R. 372.

"To authorize a recovery in any case the damage must have been within the contemplation of the parties, and the defendant must have had notice when the contract was made that mental anguish might result from a default or negligence in his performance. See 15 Am. Jur., Damages, § 182, p. 602." p. 807.

Another illustrative case is *Pfeffer* v. *Ernst,* 82 A.2d 763 (D.C. 1951), which was an action for breach of contract to hire. Damages claimed: mental shock. In denying recovery the court said:

"We think this case is governed by the general rule that in case of breach of contract a plaintiff's recovery is limited to such injuries as are the direct result of the breach and which could reasonably have been contemplated or expected by the parties. As was said in a recent case, *Lamm* v. *Shingleton,* 231 N.C. 10, 55 S.E.(2d) 810, 813: 'Contracts are usually commercial in nature and relate to property or to services to be rendered in connection with business or professional operations. Pecuniary interest is dominant. Therefore, as a general rule, damages for mental anguish suffered by reason of the breach thereof are not recoverable. Some type of mental anguish, anxiety, or distress is apt to result from the breach of any contract which causes pecuniary loss. Yet damages therefor are deemed to be too remote to have been in the contemplation of the parties at the time the contract was entered into to be considered as an element of compensatory damages.' This rule of law seems to be well established."

In *Independent Grocery Co.* v. *Sun Insurance Co.*, 146 Minn. 214, 178 N.W. 582, plaintiff alleged that plaintiff and defendant agreed upon the amount of a fire loss in a specified sum but notwithstanding this agreement defendant refused to pay the amount agreed upon so that the plaintiff was compelled to bring action to recover, after the institution of which action the defendant insurance company paid the agreed amount. The present action was brought to recover damages for loss suffered by the delay, including loss of good will and inability to pay creditors. In holding that the complaint failed to state a cause of action the court stated:

> "The complaint also alleges that the delay in the settlement and payment of the loss was ruinous to plaintiffs' business and the good will thereof; that to maintain the same and to hold their former trade an immediate resumption of the business was necessary; that they needed the insurance money to pay the demands of pressing creditors, as defendants well knew; that defendants wrongfully detained the possession of the store building after the fire an unreasonable time and until plaintiffs' patrons had turned elsewhere and the good will of the business had been lost.
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> * * * * *
>
> "The importance of the question presented, in a measure at least, is found in the unusual character of the suit, and the courage with which it stands forth in challenge of established rules of law controlling rights and liabilities in actions involving breach of contract obligations. Though the complaint abounds in allegations and charges of malice

and intentional wrongdoing on the part of defendants, the action is not one in tort, but one for the recovery of damages for a breach of the contract, and the rule of liability in actions of that kind must control the rights of the parties.

"The general rule of damages for the breach of contract obligations is well-settled law in this state. It limits the rights of the complaining party to compensation for such loss as results naturally and proximately from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into. 1 Dunnell's Dig. 2559; Paine v. Sherwood, 21 Minn. 225; Wilson v. Reedy, 32 Minn. 256, 20 N. W. 153. The facts presented do not bring the case within the rule. Neither the loss of trade nor the inability of plaintiffs to pay their creditors, or even that they were likely to have creditors in the event of a destruction of the insured property by fire, or the loss of the good will of the business, flowed naturally or proximately from the delay of defendants in adjusting and paying the loss; nor can it be said that the financial condition and business situation of plaintiffs as pictured by the complaint was within the contemplation of the parties when the contract was entered into. Those facts therefore furnish no basis for the recovery of damages, for as to the breach of the contract, whether malicious or not, plaintiffs' recovery, within the rule stated, must be limited to the amount of the legal liability under the policy with interest." p. 582-83.

While the above case is not exactly comparable with our case, it does discuss loss of good will and inability to

meet the demands of creditors. If such loss was not within the contemplation of the parties when the defendant agreed to immediately pay the claim and failed to do so then certainly the damages claimed by appellee Francis Wright could not have been within the contemplation of the parties.

To hold that in assessing damages for breach of a purely commercial contract a jury might find that loss of credit and lowering of standing in the community was reasonably within the contemplation of the parties would assimilate the rule relating to damages in tort actions and permit damages for mental suffering and everything akin thereto in every case of the breach of a commercial contract. We submit that this court should hold as a matter of law that such remote, uncertain and speculative damages were not within the contemplation of the parties at the time of the execution thereof.

(c) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant, that appellant breached this contract, and that damages for loss of credit and impairment of standing in the community are proper elements to be considered in assessing damages, title thereto would pass to the trustee in bankruptcy for Francis Wright.

It is with misgivings that we discuss this Specification of Error because this court might construe such specification as a confession of weakness of the other reasons advanced that the claim of Francis Wright fails to state a claim upon which relief can be granted. Such is not intended but we must recognize that lawyers are not infallible, and in addition, we believe a discussion

of who was vested with the title to the cause of action and claimed damages, loss of credit and lowering of standing in the community, will further emphasize our position that loss of credit and lowering of standing in the community are not proper elements to be considered in assessing damages for breach of a commercial contract.

Whether the claim for damages asserted by appellee Francis Wright did or did not pass to his trustee in bankruptcy is determined by Section 70(a) of the Bankruptcy Act, Title 11 U.S.C.A. Section 110(a), the pertinent portions of which provide that the trustee of a bankrupt shall "be vested by operation of law with the title of the bankrupt . . . to all of the following kinds of property wherever located. . . .

* * * * *

"(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process:

* * * * *

"(6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property;"

There can be no argument that under the pleadings in this case the claim of appellee Francis Wright and the claim of Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, are based on "rights of action arising upon contracts"—in fact both claims arose out of a purported breach of the same contract. There would have been only one claim had bankruptcy not intervened wherein Francis Wright would have claimed damages for breach of contract, the elements thereof being first a claim for money and labor expended by him in performing the acts which constituted acceptance of appellant's offer, and second, damages for impairment of credit and lowering of his standing in the community. Certainly from the pleadings in this case all damages accrued from a breach of an indivisible contract and would pass to the Trustee in Bankruptcy under 11 U.S.C.A. Section 110(a)(6).

Here we have the situation where appellee Matt S. Hughes, Trustee, concedes and appellee Francis Wright claims that the damages which arose out of the breach which dealt with loss of credit and lowering of standing still remain vested in appellee Francis Wright, but that all the other damages which arose out of the same contract passed to the Trustee. Since both of these appellees appear in agreement, they will probably contend that this court should look to the substance and not to the form of the action and that the claim of appellee Francis Wright is really a property right arising out of a cause of action *ex delicto* akin to a cause of action for injuries to the person which does not pass to the trustee

under the proviso clause of 11 U.S.C.A. Section 110(a) (5), and will point to such cases as *Boudreau* v. *Chesley,* 135 F.2d 623 (First Circuit, 1943). In this last case the plaintiff-bankrupt brought action against defendants alleging a malicious conspiracy to ruin the plaintiff's reputation, to drive him out of the banking business, and to deprive him of his livelihood, and to this end committed wrongful acts, such as making false representations to the Comptroller of the Currency, and others. One of the specific items of damages was "further damaged by loss of his credit standing and his reputation for integrity and honest dealing." The plaintiff-bankrupt effected a settlement with the defendants and his trustee in bankruptcy brought action to sequester the settlement amount. The court quite properly held against the trustee as title to the cause of action did not pass to the trustee under "(6) rights of action arising upon contracts" but remained vested in the bankrupt under the proviso to (5), a right of action *ex delicto.* But that is not our case here, for the damages claimed by appellee Francis Wright are based solely on a breach of contract.

In *Tamm* v. *Ford Motor Co.,* 80 F.2d 723 (Eighth Circuit, 1935) plaintiff-trustee brought action alleging a claim which the court said was difficult to decide whether it was an action *ex delicto* or *ex contractu,* but the court reached the conclusion that the action was founded on a contract between the bankrupt and defendant and that by reason of the breach thereof by defendant the bankrupt lost all his property, became insolvent, and was forced into bankruptcy, and that the title thereto

vested in the trustee, and the fact that the bankrupt was induced to enter into the contract by fraud and misrepresentation was immaterial. Thus the court, while looking to the substance, found that since the cause of action arose out of a contract title thereto and the right to recover resultant damages passed to the trustee, which is our case.

Therefore, if anyone has a right to recover damages it is the trustee, but it seems ridiculous to us to claim a breach of contract and then when it comes to the question of damages to say: we admit that the right of action arises upon a contract, but since some of the damages claimed for breach thereof are personal to the plaintiff, you must split the damages into two segments and treat the damages claimed by appellee Francis Wright as property arising out of a right of action *ex delicto,* title to which does not vest in the trustee.

We submit that the impossible position taken by the appellees wherein the trustee in bankruptcy says: I don't claim the damages caused by the breach of the contract relating to credit and standing because they constitute injuries to the person of appellee Francis Wright, but I do claim all the other damages arising out of the breach, is just about as strong an argument as we can think of in support of our prior contention that damages for loss of credit and lowering of standing in the community could not reasonably have been within the contemplation of the parties at the time the contract was entered into.

(d) The claimed contract between appellee Francis Wright and the appellant was void because of indefiniteness and uncertainty.

The offer of appellant to enter into a unilateral contract was simply an agreement to enter into a contract with a corporation to be formed by appellee Francis Wright, the terms of which would provide that appellant "would extend credit, marketing advantages and loans sufficient to finance the proposed business, all as hereinafter set forth" (Contention 7, R. 14). We believe that the phrase "all as hereinafter set forth" can only relate to the terms of the second contract that were actually embodied in that contract alleged to have been entered into on or about December 26, 1961 (Contentions 13, 14 and 15, R. 15-18), and that at the time the first contract was entered into in early October 1961 the words uttered by appellant were simply that the terms of the second contract would provide for credit, marketing advantages and loans sufficient to finance the proposed business.

It is obvious that this offer of appellant was so uncertain and indefinite that it could not possibly serve as the basis of a valid contract. Could a court determine from the terms of this alleged contract any of the requisite elements, such as duration of the contract, terms of payment, amount of loan, extent of credit, territorial extent, and obligations of the corporation? And in the event appellant declined to enter into a contract with the proposed corporation how would a court assess damages? We are therefore not citing any authorities be-

cause we believe that our contention is self-evident. However, if this court finds that the phrase "as hereinafter set forth" means that the actual promises that were made by appellant in the contract between Hank Wright's Sons, Inc. and appellant entered into on or about December 26, 1961, were actually uttered in early October 1961 we will show in our discussion of Specification of Error 3(a) that these terms were still so indefinite and uncertain as not to constitute a valid contract.

II

2. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in bankruptcy for Francis Wright, fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in bankruptcy for Francis Wright, and the district court erred in not dismissing said claim for the following reasons:

(a) Appellee Matt S. Hughes, trustee in bankruptcy, does not claim that appellant breached the contract claimed to have been entered into between appellee Francis Wright and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

(b) The claimed contract between appellee Francis Wright and Appellant was void because of indefiniteness and uncertainty.

Since the contract upon which Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, is relying is the same contract as that relied upon by appellee Francis Wright and the claims are identical except as to the respective damages claimed, all of our arguments in support of our position that the claim of appellee Francis

Wright fails to state a claim upon which relief can be granted apply with equal force to our contention that the claim of Matt S. Hughes, Trustee, fails to state a claim upon which relief can be granted, with the exception of our discussion as to who, if anyone, was entitled to recover damages for loss of credit and lowering of standing in the community (Argument under Specification of Error 1(c)).

III

3. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in Bankruptcy for Hank Wright's Sons, Inc., and the district court erred in not dismissing said claim for the following reason:

(a) The purported contract claimed to have been entered into between Hank Wright's Sons, Inc. and appellant on or about December 26, 1961, was void because of indefiniteness and uncertainty.

This specification of error deals with the second contract, the bilateral contract between Hank Wright's Sons, Inc. and appellant entered into "on or about December 26, 1961" (Contentions 13, 14 and 15, R. 15-18). However, if this court holds that the offer of appellant made in early October 1961 to enter into a unilateral contract with appellee Francis Wright (Contentions 6 and 7, R. 14) actually included the exact promises made by appellant in the above bilateral contract because of the phrase "all as hereinafter set forth" (Contention 7, R. 14), then the argument under this specification of

error should be considered by the court in determining Specifications of Error 1(d) and 2(b).

The criterion of whether any particular contract is enforceable against the claim of being too indefinite and uncertain has been stated:

> "To create a contract the minds of the parties must meet as to every essential term of the proposed contract and there must be a clear and unequivocal acceptance of a certain and definite offer in order that such offer may become a contract. Joseph v. Donover Co., 9 Cir., 1958, 261 F.2d 813; Deering-Milliken & Co. v. Modern-Aire of Hollywood, Inc., 9 Cir., 1955, 231 F.2d 623.
>
> "Oregon follows the same rule. Klussman v. Day, 107 Or. 109, 213 P. 787, rehearing denied 214 P. 348. An offer, to become a contract, must be accepted. Maeder Steel Products Co. v. Zanello, 109 Or. 562, 220 P. 155; Medford Furniture & Hardware Co. vs. Hanley, 120 Or. 229, 250 P. 876. A meeting of the minds on each and all of the essential elements is indispensable to the creation of a contractual relationship. Kretz v. Howard, 220 Or. 73, 346 P.2d 93." *Cook* v. *The MV Wasaborg,* 189 F. Supp. 464 at P. 468.
>
> "Every contract must be definite and certain as to the terms to be performed by either party, and, if it is so uncertain and ambiguous that the court is unable to collect from it what the parties intended, the court cannot enforce it; and since there is no obligation there is no contract. If the contract in any case is so indefinite as to make it impossible for the court to decide just what it means, and fix exactly the legal liability of the parties, it cannot

result in an enforceable contract." *Gaines* v. *Vandecar,* 59 Or. 187, 115 Pac. 721; 115 Pac. 1122, p. 193.

"An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain." *Restatement of the Law, Contracts,* § 32.

"A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not even enough that they have actually agreed, if their expressions are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, may prevent the creation of an enforceable contract." *Corbin on Contracts,* § 95.

The last three citations are quoted with approval in *Bonnevier* v. *Dairy Cooperative,* 227 Or. 123, 361 P.2d 262.

Turning now to the terms of the bilateral agreement (Contentions 14 and 15, R. 15-18) we will point out some of the reasons why this contract is unenforceable with quotations from pertinent cases.

One of the essential elements of any contract is the time element—commencement and duration. The alleged contract does not state when performance was to commence but from Contention 16 (R. 18) it may be argued that performance under the contract was to commence

immediately after execution. But what about the duration? The contract is absolutely silent as to how long the obligations of each of the parties were to continue. Is it terminable at the will of either party, in which there never was a binding contract? Was it to continue six months, five years, or ten years? The only thing certain was that the contract was not to continue forever, but other than this no one can tell the duration thereof.

Representative cases illustrating this point — and we have mainly selected cases dealing with agency agreements because in Contention 14(c)(10) (R. 17) appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., claims a promise by appellant to grant "certain franchise rights in a specific Oregon area" (R. 17).

In *Jordan* v. *Buick Motor Co.,* 75 F.2d 447 (7th Circuit) plaintiff alleged that the defendant promised to grant plaintiff an exclusive agency to sell and service Buick automobiles and also promised to provide a showroom for this purpose free of charge if plaintiff would procure additional capital in the amount of $40,000. Plaintiff procured the $40,000 and for a short period defendant provided a showroom but refused to grant the exclusive agency. Plaintiff sued defendant for breach of contract and the court, after citing Section 32, *Restatement of the Law, Contracts,* supra, set forth several reasons why the contract was too indefinite and uncertain, including "neither the time when the contract was to begin, nor the period for which it was to be effective, appears."

In *Curtiss Candy Co.* v. *Silberman,* 45 F.2d 451 (6th Circuit), plaintiff alleged that defendant promised to grant plaintiff the exclusive right to distribute defendant's candy and from time to time bought candy. In holding for the defendant the court said:

> "The evidence discloses no express manifestation of intent upon the subject of time. It is true that at the initial interview with defendant's salesman the plaintiffs inquired whether the promise of exclusive territory was to be considered as a temporary or a permanent arrangement, and were assured that it was intended to be permanent. But when the oral agreement was reduced to written form, by securing home office confirmation, nothing was said upon this subject." p. 452-453.

In *Chappel* v. *F.A.D. Andrea, Inc.,* 41 Ga. 413, 153 S.E. 218, defendant entered into an agency agreement for the exclusive right to sell defendant's radios as long as there was a "reasonable demand" for said radios. The court held the contract unenforceable because the duration of the contract was indefinite, for who was to determine what constituted "reasonable demand"? "It cannot amount to a permanent contract, but even if it should, it has been held that such a contract is terminable at will."

In *Tamm* v. *Ford Motor Co.,* 80 F.2d 723 (8th Circuit) at p. 729 the court stated:

> "If the petition shall be considered as an action based on a breach of a written contract, of which it bears some earmarks, then plaintiff fares no better. For the contract of which only a fragment is set out

in the petition does not, we repeat, bind the defendant to sell any given number of cars, trucks, or parts thereof to the bankrupt, nor does it fix any period whatever to its duration."

One of the obligations of the contract was a promise by appellant "to furnish necessary merchandise for its business activities" (Contention 14, R. 15-16) and the counterpart was a promise by Hank Wright's Sons, Inc. "to buy from defendant or have available a sufficient quantity of defendant's products to meet the demands of the market in its operating area" (Contention 15(b), R. 17).

Who is to determine what merchandise and what quantity is necessary? What was the price to be paid by Hank Wright's Sons, Inc. for the "necessary merchandise"? While the appellant promised to authorize a line of credit of at least $200,000, when was payment for the merchandise to be made? Other various and sundry extra discounts were promised but the base price to be paid for merchandise is nowhere stated.

A representative case holding that the "price" must be definitely stated and that a "reasonable price" cannot be inferred is *Raisler Sprinkler Co.* v. *Automatic Sprinkler,* 36 Del. 57, 171 A. 214. Hank Wright's Sons, Inc. is not even obligated to buy merchandise from the appellant since it could either buy merchandise from the appellant or procure it from other sources. Who is to determine whether the corporation (and by the use of the word "corporation" we have reference to Hank Wright's Sons, Inc.) has a "sufficient quantity of de-

fendant's products"? And who is to determine the "operating area"? Coupled with this is an alleged promise to designate the corporation "associate dealer on the east side of the Willamette River for the Portland area, and would give it certain franchise rights in a specific Oregon area". What is meant by an "associate dealer" and what were the "franchise rights" that were to be granted and what was the "specific Oregon area" to which the franchise right was to apply?

It should be borne in mind that the contract in question cannot be interpreted as a "requirement" contract as the business to be established by the corporation was new.

Turning now to the promise to loan $40,000 for operating capital: When was this loan to be made? The most that can be said is that the money was to be advanced in installments, for in Contention 17 (R. 18) the bankruptcy trustee alleges that defendant refused to furnish the first $10,000 cash due under the contract. Assuming that $10,000 was due forthwith, when was the remaining $30,000 to be paid, and what is more important, when was the $40,000 to be repaid and what was the interest rate?

In *Garcin* v. *Granville Iron,* 244 N.Y.S. 145, plaintiff sued on a note signed by the defendant and defendant as a defense and as a counterclaim alleged an agreement on the part of the plaintiff to finance the business in a larger amount than the note sued upon and claimed that the instant note was only a part of a larger obligation. Disposing of this contention the court said:

"The agreement does not specify the nature of the advances to be made or the terms. Was the plaintiff to make loans upon notes of the corporation, or was he to purchase shares of stock. If it was intended that the financing should assume the form of loans or the purchase of notes, at what discount were the notes to be taken? When were the loans to be made? What rate of interest should they bear? When would they mature, and what security was to be given? If the financing was to consist of the purchase of stock, what was to be the class of stock, and what were to be its preference? At what price was it to be purchased? Contracts more definite than this have been held void for lack of certainty."

In *Wilcox, Inc.* v. *Shell Eastern,* 283 Mass. 383, 186 N.E. 562, the court stated:

"The instrument provides nothing as to the time of payment or terms of payment by the plaintiff."

The same remarks apply to the promise to extend a line of credit of at least $200,000.

Turning now to the obligation to furnish "without any obligation of repayment" $2,000 for identification of plaintiff's equipment and building as being a dealer for defendant and $3,000 for advertising within the first year, and to "furnish cooperative advertising in which the defendant would pay 75% of the cost and the plaintiff would pay $25% of the cost" (Contention 14(c)(1), (2) and (5), R. 16), just what identification was to be placed on the equipment and building and how should the amount be divided between equipment and building? Who was to determine the medium for the $3,000 ex-

penditure for advertising the first year and who would determine the nature of the cooperative advertising?

In *Wilcox, Inc.* v. *Shell Eastern,* 283 Mass. 383, 186 N.E. 562, the court, in holding a contract unenforceable because too indefinite and uncertain, stated:

> "The defendant was to pay for all newspaper and billboard advertising and a 'portion of the cost of direct mail advertising' but there is nothing to indicate how the questions whether or not any advertising was to be done, what was to be advertised or the extent of such advertising were to be determined. If there should be direct mail advertising, however, that question might be determined, the defendant was to pay some portion thereof, although there is no indication as to what portion of the cost. There is nothing in the record which enables the court to interpret and apply this part of the instrument."

Turning now to the promises for discounts: (Contention 14 (c)(3), (7), (11), R. 16-17), who was to determine the prices on which the discounts would be based, and what particular top-line brand was to be excepted?

Another of the purported obligations of appellant was to furnish $1,000 by reclassifying 200 Safeway brand highway tires as "seconds," (Contention 14(c)(6), R. 16). Even assuming that by extrinsic evidence Safeway brand highway tires can be shown to be top-line tires, what was the appellant required to do in order to furnish $1,000 without any obligation of repayment?

Turning now to the miscellaneous promises: (Contention 14(c)(8), (9), and (12), R. 16-17), who would

determine what constituted a "giant tire service truck"? What was the nature of the assistance that appellant should render the corporation in bidding on road construction jobs—was appellant to make a cost estimate after inspecting the prospective job or merely to answer any questions put to it by the corporation with reference to the prospective job? Who was to determine the amount that appellant should pay the employee of the corporation while working for appellant and who was to determine when this employee's services were needed by the corporation?

The cases that we have heretofore cited for reference on a particular point often hold the contract that was before the court unenforceable on the particular point we quoted. Here we find not one but many indefinite and uncertain provisions. Further, when we consider the promises of Hank Wright's Sons, Inc. (Contention 15, R. 17-18) which were the purported consideration for the promise of appellant we find only a generalized promise to use its best efforts to further the sale of appellant's merchandise and to maintain facilities and a sales organization sufficient to meet the demands of the market in its area.

In conclusion we quote from *Tamm* v. *Ford Motor Co.,* supra, at p. 730:

> "This may under the facts involve a hardship, but the time to guard against such hardships is when men make improvident contracts, and not when such contracts come before the courts. This thought was well expressed by Judge Parker in the late case of Ford Motor Co. v. Kirkmyer Motor Co., supra, 65 F. (2d) 1001, page 1006, wherein he says:

"It appears that plaintiff has been disappointed in its expectations and has been dealt with none too generously by the defendant; but, while we sympathize with its plight, we cannot say from the evidence before us that there has been a breach of binding contract which would enable it to recover damages. While there is a natural impulse to be impatient with a form of contract which places the comparatively helpless dealer at the mercy of the manufacturer, we cannot make contracts for parties or protect them from the provisions of contracts which they have made for themselves. Dealers doubtless accept these one sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them; but, after they have made such contracts, relying upon the good faith of the manufacturer for the protection which the contracts do not give, they cannot, when they get into trouble, expect the courts to place in the contracts the protection which they themselves have failed to insert.' "

IV

4. Judgment on the pleadings as to the claim of appellee Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., without prejudice to appellant's counterclaims should be granted for the reason that:

(a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant; or

(b) Said contract was expressly superseded by the bilateral contract between Hank Wright's Sons, Inc., and appellant entered into December 27, 1961.

Specification of Error 4(a) and (b) need not be considered by the court if the court rules in appellant's favor on Specification of Error 3(a).

The point covered by these specifications of error involves elementary contract law which needs no citation of authorities. The contract on which Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc., is relying is the bilateral contract between that corporation and appellant entered into "on or about December 26, 1961" (Contentions 13, 14 and 15, R. 15-18). The promises made by Hank Wright's Sons, Inc., which are claimed to be the consideration for the promises of appellant are:

> "15. That by the terms of said contract, the plaintiff Hank Wright's Sons, Inc. promised to the defendant to:
>
> (a) Use its best efforts to further the sales of defendant's products,
>
> (b) To buy from defendant or have available a sufficient quantity of defendant's products to meet the demands of the market in its operating area, and
>
> (c) Maintain an inventory, warehouse and retreading facilities and sales organization sufficient to meet the demands of the market in its area." (Contention 15, R. 17-18)

Under date of December 27, 1961 Hank Wright's Sons, Inc., and appellant entered into a written contract

entitled "United States Dealer's Consignment Agreement" being Exhibit A attached to the Pretrial Order (R. 24-28). Appellees admit the execution thereof (R. 23). Paragraph 19 of Exhibit A (R. 27) provides as follows:

> "19. In consideration of the execution of this agreement by the Consignor, and of the prices, allowances and terms herein extended by the Consignor to the Consignee, the Consignee shall among other things:
>
> (a) Use his best efforts to sell the Consignor's United States Brands of tires, tubes, batteries, camelback, repair materials, and line of accessories, shall specialize in the sale of same, and shall not offer or attempt to substitute the merchandise of any other manufacturers when United States Brands are asked for by the customer.
>
> (b) Maintain at PORTLAND, OREGON, a suitable and adequate place of business, identified and advertised as a distributing center for the Consignor's merchandise, displaying signs and advertising furnished by the consignor thereon.
>
> (c) Maintain an adequate stock of the Consignor's brands of the above mentioned merchandise on hand at all times so as to be in a position to supply promptly the immediate and forward requirements of its trade.
>
> (d) Maintain adequate and suitable service facilities for the handling of all types of tire service; also employ the necessary manpower to accomplish market objectives as determined by the Consignor from time to time.

(e) Exert his best efforts to obtain from his immediate market a volume of business that shall be satisfactory to the Consignor and consistent with the objectives agreed upon from time to time between the Consignor and the Consignee as a reasonable measure of available sales potential.

(f) Handle Customer Claims involving the Consignor's merchandise in accordance with the terms of its policy in effect from time to time for handling Customer Claims."

A perusal of the promises made by Hank Wright's Sons, Inc. under both contracts shows that the promises made by Hank Wright's Sons, Inc. were the same under both contracts.

"On or before December 26, 1961" would permit proof of the execution within a reasonable time either prior to or subsequent to December 26, 1961. Now if the proof adduced by appellees shows that the contract they claim was entered into on or about December 26, 1961, was actually executed subsequent to the admitted contract, Exhibit A, there was no consideration whatsoever for the promises of appellant since Hank Wright's Sons, Inc. were already obligated to appellant to perform all the acts which were the consideration for appellant's promises and the contract alleged by appellees would be void for lack of mutuality.

On the other hand if the admitted agreement, Exhibit A, was executed subsequent to the contract entered into on or about December 26, 1961, this agreement would supersede the agreement relied upon by appellee

Matt S. Hughes, Trustee for Hank Wright's Sons, Inc. because of the repugnancy in the terms of the two contracts and because it so specifically provides:

> "25. This agreement shall supersede all agreements previously made between the parties on the subject of the furnishing, selling or consignment of tire merchandise. All merchandise shipped by the Consignor to the Consignee after this agreement becomes effective shall be received by the Consignee as consigned merchandise under this agreement." (R. 28).

We appreciate that the basis for this Specification of Error should be a motion for judgment on the pleadings and no such formal motion has been made. However in the Pretrial Order appellant did raise this point (Defendant's Contention 8, R. 21) and since such a motion may be made any time prior to trial, we believe that the court should rule thereon if the court rules adversely to appellant on its Specification of Error 3(a).

CONCLUSION

We submit that the claim of appellee Francis Wright and the claim of appellee Matt S. Hughes, Trustee in Bankruptcy for Francis Wright, each of which is based on the same contract, should be dismissed for failure to state a claim upon which relief can be granted because:

1. No breach of the alleged contract is claimed;

2. The alleged contract is too indefinite and uncertain to constitute a valid contract; and

In the event the court rules adversely to appellant on both of the foregoing contentions the claim of appellee Francis Wright still should be dismissed because the only damages claimed: loss of credit and lowering of standing in the community, are not proper elements to be considered in assessing damages for breach of a purely commercial contract, and even if they are, appellee Francis Wright has no title thereto.

The claim of Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc. should be dismissed for failure to state a claim upon which relief can be granted because the alleged contract is too indefinite and uncertain to constitute a valid contract. If this court holds adversely to this contention the claim still should be dismissed because of failure of consideration or because the contract was superseded by a later agreement, depending on whether appellee Matt S. Hughes, Trustee in Bankruptcy for Hank Wright's Sons, Inc. takes the position that the admitted contract, Exhibit A, was entered into prior or subsequent to the contract alleged by appellees.

We believe that all three claims should be dismissed, but, as we have heretofore pointed out, a holding that one of the claims does state a claim upon which relief can be granted does not preclude a favorable ruling on the other claims.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK MCK. BOSCH
of Attorneys for Appellant